

**NOT FOR PUBLICATION**

Robert M. Vied,	)	No. CV-04 2567-PHX-SRB
Plaintiff,	)	
vs.	)	<b>OPINION AND ORDER</b>
	)	
Pinnacle Nissan Infiniti,	)	
Defendant.	)	

## I. BACKGROUND

<sup>1</sup>Although the caption names Defendant as "Pinnacle Nissan Infiniti," the Court notes that Defendant's correct name is Pinnacle Nissan, Inc.

1 Court's assistance "to redress the abuses of sexual and mental harassment and assault while  
2 an employee [of Defendant]" and sought compensatory and punitive damages. (Compl. ¶ 2.)  
3 Plaintiff did not request a jury trial in his original Complaint.

4 Plaintiff served his Complaint on Defendant on March 9, 2005, and Defendant filed  
5 its answer on March 29, 2005.

6 On May 27, 2005, Plaintiff's attorney filed a Notice of Appearance. (Doc. 14.) On  
7 June 16, 2005, Plaintiff, for the first time, filed a Demand for Jury Trial. (Doc. 16.)  
8 Defendant moved to strike Plaintiff's Demand for Jury Trial on June 27, 2005, arguing that  
9 Plaintiff's Demand was untimely. (Doc. 17.)

10 Plaintiff filed a Motion to Amend his Complaint along with a Proposed Amended  
11 Complaint on July 20, 2005. (Doc. 24.) Plaintiff states that the purpose of his Proposed  
12 Amended Complaint is to clarify and/or amend "the causes of action alleged in the original  
13 Complaint . . . ." (Prop. Am. Compl. Opening ¶.) In his Proposed Amended Complaint,  
14 Plaintiff alleges that from around June 27, 2003 until February 17, 2004, he "was physically  
15 and verbally taunted and harassed by fellow employees as being gay, which occurred with  
16 the knowledge of supervisors." (Prop. Am. Compl. ¶ 7.) Plaintiff further alleges that the  
17 "verbal comments . . . and the physical touching were of a graphic sexual nature and made  
18 on a daily basis," and that, although he complained to management, Defendant failed to stop  
19 the alleged harassment from occurring and eventually eliminated Plaintiff's job. (Prop. Am.  
20 Compl. ¶¶ 8-10.) The Amended Complaint states that Plaintiff filed a Charge of  
21 Discrimination with the Equal Employment Opportunity Commission ("EEOC") around July  
22 14, 2004, and that EEOC issued a Notice of Right to Sue to Plaintiff around August 17, 2004.  
23 (Prop. Am. Compl. ¶¶ 12, 13.) The general allegations are followed by five counts alleging  
24 sex and gender discrimination in employment, retaliation, defamation of character, and  
25 intentional infliction of emotional distress.

26 Defendant filed its Response to Plaintiff's Motion to Amend on July 29, 2005. (Doc.  
27 26.) Defendant stated in its Response that it does not oppose Plaintiff's Motion to Amend,  
28 as it is merely an "attempt to clean up the pleadings," and argues that Plaintiff's claims in the

1 Amended Complaint "are identical to those raised in his original Complaint." (Def.'s Resp.  
2 to Pl.'s Mot. to Am. at 1-2.)

## 3 **II. LEGAL STANDARDS AND ANALYSIS**

### 4 **A. Motion to Amend**

5 Rule 15(a) of the Federal Rules of Civil Procedure states that a party may amend its  
6 pleading "by written consent of the adverse party" and that leave to amend a pleading "shall  
7 be freely given when justice so requires." As the United States Court of Appeals for the  
8 Ninth Circuit has held, "[o]nce the adverse party has consented to the amendment of a  
9 pleading, the court has no control over the matter under Rule 15(a)." *Fern v. United States*,  
10 213 F.2d 674, 677 (9th Cir. 1954).

11 In this case, Plaintiff filed his Proposed Amended Complaint "to clarify and/or amend  
12 the causes of action alleged in the original Complaint filed by Plaintiff, who was acting *pro*  
13 *se* at the time of filing such Complaint, and which Complaint did not appropriately identify  
14 specific counts or all the bases for the Complaint." (Mot. to Am. at 1.) The Court agrees that  
15 Plaintiff's original Complaint did not appropriately identify specific counts or all the bases  
16 for his Complaint. Defendant stated in its Response that it does not oppose Plaintiff's Motion  
17 to Amend "[t]o the extent that Plaintiff's Amended Complaint attempts to 'clean up the  
18 pleadings.'" (Def.'s Resp. to Pl.'s Mot. to Am. at 2.) Given that Defendant has consented  
19 to Plaintiff's Proposed Amended Complaint, this Court has no control over the matter under  
20 Rule 15(a) and grants Plaintiff's Motion to Amend his Complaint and accepts Plaintiff's  
21 Complaint as amended.<sup>2</sup>

### 22 **B. Demand for Jury Trial**

#### 23 **1. Waiver**

24 Federal Rule of Civil Procedure 38(b) requires that a party file a demand for a jury  
25 trial within ten days after service of the "last pleading directed to such issue." The federal  
26

---

27 <sup>2</sup>Because the Court accepts Plaintiff's Proposed Amended Complaint, it will use the  
28 term "Amended Complaint" for the rest of this Order.

1 rules treat a party's failure to comply with the rules governing requests for a jury demand as  
2 a waiver of that party's right to a jury trial. *See* Fed. R. Civ. P. 38(d).

3 Normally, the "last pleading" directed to an issue is the defendant's answer to the  
4 issue(s) raised in the complaint. *See, e.g., McCarthy v. Bronson*, 906 F.2d 835, 840 (2nd Cir.  
5 1990), *aff'd*, 500 U.S. 136, 111 S.Ct. 1737 (1991). *See also Kletzelman v. Capistrano*  
6 *Unified Sch. Dist.*, 91 F.3d 68, 71 (9th Cir. 1996) (defendant's answer was last pleading for  
7 purposes of Rule 38(b)). The last pleading in this case was Defendant Pinnacle Nissan Inc.'s  
8 Answer filed on March 29, 2005. Therefore, Plaintiff's demand for jury trial was due by  
9 April 12, 2005. Because Plaintiff filed his Demand for Jury Trial on June 16, 2005, more  
10 than ten days after Defendant filed its answer, Plaintiff waived his right to a jury trial.

11 In the case of an amended pleading, courts will sometimes grant a demand for jury  
12 trial made within ten days after service of the amended pleading. *See, e.g., Clement v. Am.*  
13 *Greetings Corp.*, 636 F. Supp. 1326, 1334 (S.D. Cal. 1986) (citing *Trixler Brokerage Co. v.*  
14 *Ralston Purina Co.*, 505 F.2d 1045, 1049-50 (9th Cir. 1974); *Pradier v. Elespuru*, 641 F.2d  
15 808, 810 n.1 (9th Cir. 1981)). However, the right to a jury trial is only revived by an  
16 amended pleading that raises an issue "not previously raised in the original complaint." *Cal.*  
17 *Scents v. Surco Prod., Inc.*, 406 F.3d 1102, 1106 (9th Cir. 2005). A new *theory*, though,  
18 "'does not constitute the presentation of a new *issue* on which a jury trial should be granted  
19 [as of right] under . . . Rule 38(b).'" *Lutz v. Glendale Union High Sch.*, 403 F.3d 1061, 1066  
20 (9th Cir. 2005) (emphasis and alteration in original) (quoting *Trixler*, 505 F.2d at 1050). As  
21 noted by the *Cal. Scents* court, "Rule 38(b) is concerned with issues of *fact*." *Cal. Scents*,  
22 406 F.3d at 1106 (emphasis in original) (quoting *Lutz*, 403 F.3d at 1066). Thus, if the issues  
23 in the original complaint and the amended complaint turn on the same "matrix of facts," then  
24 a party is not entitled to a trial by jury. *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614,  
25 620 (9th Cir. 1979).

26 Plaintiff admits that his Amended Complaint was filed "for the purpose of clarifying  
27 and amending his Complaint to identify which causes of action he had intended to allege in  
28 his Complaint." (Pl.'s Resp. to Def.'s Mot. to Strike at 2.) Plaintiff's original Complaint

1 alleges that he was subjected to sexual harassment, a hostile work environment, defamation  
2 and emotional distress while employed by Defendant. Plaintiff's Amended Complaint  
3 contains five counts alleging sex and gender discrimination in employment, retaliation,  
4 defamation of character, and intentional infliction of emotional distress. Each of these counts  
5 in the Amended Complaint is based on the same "matrix of facts" as Plaintiff's original  
6 Complaint, i.e., that he was allegedly subjected to physical touching and verbal comments  
7 "of a graphic sexual nature," that Defendant failed to stop the alleged harassment from  
8 occurring, and that Defendant eventually eliminated Plaintiff's job in retaliation.<sup>3</sup> Thus,  
9 Plaintiff's Amended Complaint did not present any new issues of fact and, so, did not revive  
10 Plaintiff's right to demand a jury trial.

## 11                   2.     Discretion

12           Plaintiff has alternatively requested that the Court exercise its discretion under Rule  
13 39(b) of the Federal Rules of Civil Procedure to grant Plaintiff's Demand for Jury Trial. This  
14 Court's discretion in such matters is "narrow," however, and a court may not grant relief  
15 when a party's untimeliness "results from an oversight or inadvertence." *Kletzelman*, 91  
16 F.3d at 71 (quoting *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1357 (9th Cir. 1984)). As the  
17 Ninth Circuit has explained, "[a]n untimely request for a jury trial must be denied unless  
18 some cause beyond mere inadvertence is shown." *Pac. Fisheries Corp. v. HIH Cas. & Gen.*  
19 *Ins., Ltd.*, 239 F.3d 1000, 1002 (9th Cir. 2001). *See also Zivkovic v. S. Cal. Edison Co.*, 302  
20 F.3d 1080, 1086 (9th Cir. 2002) (finding plaintiff's request for jury trial was untimely despite  
21 plaintiff's argument that he was *pro se* and unaware of the requirements of Rule 38(b)).  
22 Plaintiff in this case has shown no cause beyond mere inadvertence nor offered any  
23 explanation for his failure to demand a jury trial within the time specified by Federal Rule  
24 of Civil Procedure 38(b). Therefore this Court is unable to exercise its discretion in granting  
25 Plaintiff's Demand for Jury Trial.

---

27           <sup>3</sup> The only truly new fact in Plaintiff's Amended Complaint is that Plaintiff filed a  
28 charge of discrimination with the EEOC and received a right-to-sue letter from the agency.

1           **IT IS ORDERED** granting Plaintiff's Motion to Amend Complaint (Doc. 24).

2           **IT IS FURTHER ORDERED** granting Defendant's Motion to Strike Plaintiff's  
3 Demand for Jury Trial (Doc. 17).

4

5

6

DATED this 7<sup>th</sup> day of October, 2005.

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23


24

25

26

27

28

  
\_\_\_\_\_  
Susan R. Bolton  
United States District Judge